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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ROY C. CHEATHAM, and 72 other class members for themselves and the class of more than 800 federal law enforcement officers,

Petitioners,

v.

H. E. MONROE, JR., as Commissioner of the Alabama Department of Revenue; DOUG NELSON, individually and as President of the Alabama State Police Association; and STEVE WOLFE, individually and as President of the Alabama State Trooper Association, Inc.,

Respondents.

Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama

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PETTTION FOR WRIT OF CERTIORARI

JAMES M. SIZEMORE, JR.*
Attorney at Law
461 South Court Street
Montgomery, AL 36104
(334) 265-1121
Attorney for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED FOR REVIEW

Whether Alabama's state income tax, which taxes all the income of federal law enforcement officers, but excludes from taxable income a portion of the income Alabama pays its own state law enforcement officers, violates the Public Salary Tax Act (4 U.S.C. § 111 (1988)) or the Supremacy Clause of the Constitution (U.S. CONST. art. VI, cl. 2).

ALL PARTIES TO THE PROCEEDING

Petitioners/Plaintiffs

Roy C. Cheatham
Lawrence E. Smith
Danny R. Whitson
Henrietta S. Curry
Donald R. Shirley
Robert J. Tolbert
Dana R. Andrews
James C. Tanner, Jr.
Dwight N. McDaniel
Pamela M. Mixon
Sharon Hinton Murphy
William Michael Booker
Andrew F. Soto
David J. Mackdanz
James T. Wyatt
Clive V. Mott, Jr.
James A. Moseley
Alan Bernard Dates
Everett Wade Hughey
Phetis Porter
Fred Pearson
Sheila Diane Easter
Vickie Sawyer
Michael Wills
Edward Moragne
Corliss L. Moragne
Cathy G. Dotson
Barbara J. Gardner
Carla Dawn Truitt
George D. Thomas
Anthony Chatmon
Steven B. Palmer
Dawn F. Abrams
Robert J. McCormick, Jr.
Emory Brent Hampton
Robert W. Wallace
Karen Norfleet
Michael S. Russell
Frank B. Elliott
Katrene W. Chatman
Mona Smith
Gregory Singleton
Linda Fay Cole
Edward Bush, Jr.
Sidney N. Kopp, Jr.
Kevin T. Jenkins
Standard Woods
Milton Rowe
Gary Wright
Joseph B. Bettner
Sheila A. Agerton
Hugh B. Sovik
Michael A. Holt
John R. Davis
John R. New, Sr.
John Roger Lemon
Robert Lee Strown
Terry A. Liptrot
Steven Swain
Sybil R. Hall-McNeil
Anthony Williams
Terri Ann Moore
Mary T. Ruffin
Mark H. Smith
Dean Halsey
Perry L. Zaner
Juan E. Burke
Ricky L. Smith
Nolan McAlpine
Dave L. Behrend
Kenneth Holt

A class composed of all individuals employed by the United States of America, or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during any of the calendar years 1990; 1991; 1992; 1993; 1994; or 1995, and have, without a concluded final assessment determining tax liability, either paid Alabama state income tax thereon for any of the calendar years 1990; 1991; 1992; 1993; 1994; or 1995, or incurred potential Alabama state income tax liability for any of those calendar years.

Respondent/Defendant

H.E. Monroe, Jr., as Commissioner of the Alabama Department of Revenue

Respondents/Intervenors

Doug Nelson
Steve Wolfe
Alabama State Police Association
(no parent or subsidiary)
Alabama State Trooper Association, Inc.
(no parent or subsidiary)

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Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The Alabama Court of Civil Appeals decision sought to be reviewed is *Cheatham v. Eagerton,* No. 2951068, slip op. (Ala. Civ. App. Mar. 14, 1997) and is not yet officially reported. A-1a. An unofficial citation is 1997 Ala. App. LEXIS 205.

BASIS FOR JURISDICTION

The decision sought to be reviewed is the judgment of the Alabama Court of Civil Appeals dated March 14, 1997. The Alabama Court of Civil Appeals denied a timely application for rehearing on May 9, 1997. A-11a. The Alabama Supreme Court denied the Petitioners' timely Petition for Writ of Certiorari to the Alabama Court of Civil Appeals on August 22, 1997. A-12a.

This Court has jurisdiction over the present case under 28 U.S.C. § 1257(a) (1988). Supreme Court Rule 10(c) states also that jurisdiction is proper when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are reprinted in the appendix at pages 13a to 31a (both inclusive):

U.S. CONST. art. VI, cl. 2

4 U.S.C. § 111

ALA. CODE § 36-21-2 (1975)

ALA. CODE § 40-18-2 (1975)

Act of Sept. 5, 1973, No. 763, 1973 ALA. ACTS 1145

Act of Nov. 14, 1975, No. 99, 1975 ALA. ACTS 2780

Act of May 15, 1984, No. 84-306, 1984 ALA. ACTS 679

Act of May 29, 1985, No. 85-754, 1985 ALA. ACTS 1254

Act of Apr. 29, 1986, No. 86-433, 1986 ALA. ACTS 799

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Act of Aug. 13, 1987, No. 87-814, 1987 ALA. ACTS 1625

Act of Apr. 22, 1994, No. 94-595, 1994 ALA. ACTS 1102

Act of May 29, 1997, No. 97-720, 1997 ALA. ACTS

STATEMENT

At least since 1986, federal law enforcement officers employed in Alabama have paid and are paying a larger Alabama state income tax than identically situated state law enforcement officers, the only difference between the two being the source of their income. The State of Alabama is indirectly taxing federal activity, specifically federal law enforcement, to provide a disproportionate amount of the state's funding.

Since 1973, the State of Alabama has paid law enforcement officers employed by the State in certain specifically named state agencies, a daily amount over and above their regular pay. A-18a. It called the additional sum a "subsistence allowance." *Id.* The only conditions to its receipt were that the employee be:

1. A state law enforcement officer of the State of Alabama;
2. Employed in certain specifically named state agencies; and
3. Engaged in the performance of his duties as a law enforcement officer.

Id. There was no mention of federal or state tax liability on this sum. *Id.*

In 1984, the legislature added a provision to the "subsistence allowance" as follows:

> (b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on

> duty, and is not to be considered as compensation under the laws of this state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government.

A-20a to A-21a. Two years later it eliminated any restriction on the use of the "subsistence allowance" by deleting the first sentence of this subsection, but retained the exclusion from income tax, which now provides:

> (b) This subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

A-24a. The attempt by the Alabama legislature to make the income free of federal tax is not an issue in this case, as that attempt has been universally recognized as futile, most importantly by the Internal Revenue Service. Since the enactment of subsection (b), the favored state law enforcement officers have received pay free of state income tax for engaging in their duties as law enforcement officers, while federal law enforcement officers must pay state income tax on all of their income while engaging in their duties. Thus, a federal law enforcement officer will pay a larger Alabama state income tax than an identically situated state law enforcement officer, the only difference between the two being the source of the income.

The plaintiffs, in their initial complaint filed in state court, challenged the validity of Alabama's state income tax laws, which excluded from taxable income a portion of the amounts the State paid to its own employees, but gave no similar exclusion from income to federal employees, taxing federal officers on all of their wages. A-34a to A-36a (both inclusive).

The trial court acknowledged the nature of this challenge in its final order when it noted that "Plaintiffs claim that there is a discriminatory tax scheme in violation of 4 U.S.C. § 111 as a result of their not being given the same exemption afforded certain state law enforcement

officers pursuant to Sec. 36-21-2, Code." A-6a. The trial court ruled, however, that a statute which gave a state income tax exclusion only to certain employees of the State, but not to those employed by the United States and others, did not discriminate on the basis of the source of the income. A-9a to A-10a.

The Alabama appellate court decision of which review is sought acknowledged that "[t]he dispositive issue is whether the tax scheme at issue violates the doctrine of intergovernmental tax immunity and 4 U.S.C.A. § 111." A-2a. It resolved that issue, however, by allowing the described discrimination, holding illogically that a state income tax scheme which taxed all the income of federal law enforcement officers but excluded income of state officers calculated at a *per diem* rate, did not discriminate on the basis of the source of the income, but rather it discriminated against the federal employees because they "do not receive a comparable daily . . . allowance from the Federal Government." A-3a.

REASONS FOR GRANTING THE PETITION

It is important for this Court to grant the petition because the decision of the Alabama courts:

(a) directly challenges the authority and supremacy of federal law, contravening a specific federal statute, the Public Salary Tax Act;

(b) decided an important federal question in a way which conflicts with decisions of this court, particularly *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960) which held that a State may not impose tax burdens on those who deal with the federal government while not imposing the same burdens on others similarly situated, and *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) which held that heavier taxes imposed on those dealing with one sovereign than on those dealing with the other must be justified by significant differences between the two classes; and

(c) allows a discrimination against more than 800 federal employees in Alabama which continues to expand and enlarge.

Because of the limits on district court review of state tax matters contained in 28 U.S.C. § 1341 (1988), this Court is the only federal forum available to prevent a state from enlarging its tax revenues at the expense of federal employees, while exempting its own employees from the burdens placed on the federal employees. *Arkansas v. Farm Credit Serv. of Cent. Ark.*, 520 U.S. ——, 138 L.Ed.2d 34, 38 (1997). The statute at issue is facially discriminatory in that it benefits only state employees. No others can obtain the tax exclusion, no matter their circumstances.

This Court has already noted that "[t]he danger that a state is engaging in impermissible discrimination against the Federal Government is greater when the State acts to benefit itself and those in privity with it." *Davis v. Michigan Dept. of Treasury*, 489 U.S. at 815 n.4. "Accordingly, it does not seem too much to require that the state treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. at 385. The Alabama courts have allowed the State to benefit its own employees with an expanding and enlarging tax exclusion not given to employees of the Federal Government. Only this Court is available to halt the discrimination.

I. CHALLENGE TO FEDERAL SUPREMACY

Alabama's state income taxation scheme is specifically prohibited by the Public Salary Tax Act of 1939, codified at 4 U.S.C. § 111 (1988). The operative words in 4 U.S.C. § 111 (1988) are that "[t]he United States consents to the taxation of pay or compensation . . . if the taxation does not discriminate . . . because of the source of the pay or compensation." *Davis v. Michigan Dept. of*

Treasury, 489 U.S. at 809 (ellipsis in original; internal quotes omitted). The "nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine which has, from the time of the McCulloch v. Maryland [4 Wheat. 316 (1819)], barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Id.* at 812 (second brackets in original).

Alabama's state income tax discriminates against those with whom the United States deals, its law enforcement employees. No federal law enforcement officers can qualify for the exclusion and they all pay the higher tax. ALA. CODE § 40-18-2 (1975). All state law enforcement officers receiving the extra funds are granted the exclusion and all pay the lower tax. ALA. CODE § 36-21-2(b) (1975). This is a discrimination based solely on the source of the income received by the federal officers. If they had been paid by the state, they would pay a lower tax, but since they are paid by the United States, they pay a higher tax. The exclusion, by its terms and on its face, applies only to employees of the State of Alabama. ALA. CODE § 36-21-2 (1975). This is discrimination on the basis of the source of the income.

Alabama's courts attempt to distinguish between state and federal employees on the basis that employees of one receive income calculated on a *per diem* basis while employees of the other do not. A-3a. A distinction on that basis is nonsensical. Such a distinction is not a "significant difference" as required by *Davis*, and it creates an "Alabama rule" which ignores and contravenes established federal law. There is no distinction between $8.00 paid to a state officer and $8.00 paid to a federal officer, even if the $8.00 paid to the state officer is calculated at a *per diem* rate and the $8.00 paid to a federal officer is paid as a part of an annual salary. Such a claimed distinction has no more significance than discriminating on the basis of the color of the check by which the funds

are paid. Alabama may not provide that compensation paid with a pink check (used by the state comptroller) is excluded from income and compensation paid with a green check (used by the U.S. Government) is fully taxable. The rule announced is no less foolish.

The state court erred by focusing on the calculation of the extra pay which state employees receive by virtue of ALA. CODE § 36-21-2(a) (1975) and which is calculated on a *per diem* basis, rather than the exclusion of ALA. CODE § 36-21-2(b) (1975). It is the latter, not the former, which creates the unconstitutionality. The State may pay its employees whatever amount it chooses, and calculate that pay however it pleases. It may not, however, exclude any portion of what it pays its employees from state income tax without allowing similar exclusions to federal employees, unless there are significant differences between the two. No such differences are expressed in the statute.

The Alabama courts have enunciated a holding which directly challenged the supremacy of 4 U.S.C. § 111 in Alabama, and has held it for nought. "[T]he laws of the United States . . . shall be the supreme Law of the Land. . . ." U.S. CONST. ART. VI, cl. 2. This Court is the only federal forum available to reestablish the supremacy of federal law. It is important that it do so.

II. CONFLICTS WITH PRIOR SUPREME COURT DECISIONS

There is ample compelling authority from this Court that the extra burden of taxation imposed on federal law enforcement officers by the Alabama state income tax is unconstitutional and void because it violates the intergovernmental tax immunity doctrine. "[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private parties with whom it does business . . . *as long as the tax*

does not discriminate against the United States or *those with whom it deals.*" *South Carolina v. Baker,* 485 U.S. 505, 523 (1988) (emphasis supplied).

The decision in this case allows Alabama's state income tax to discriminate against those with whom the United States deals, its law enforcement employees. There is a simple demonstration illustrating that the tax discriminates against those who deal with the federal government. *All* federal law enforcement officers are denied the exclusion and pay the higher tax. ALA. CODE § 40-18-2 (1975). *All* state law enforcement officers receiving the extra funds have the exclusion and pay the lower tax. ALA. CODE § 36-21-2(b) (1975). This is a discrimination based solely on the source of the income received by the federal officers.

In *Davis v. Michigan Dept. of Treasury* the State of Michigan taxed the retirement benefits of federal civil service employees, but exempted retirement benefits of state retirees. *Davis v. Michigan Dept. of Treasury,* 489 U.S. at 805. The state argued that its interest in hiring and retaining qualified civil servants, and the fact that federal retirement was more generous than state retirement were sufficient "significant differences" to justify the discrimination. *Id.* at 816. This Court concluded that they were not, however, and determined that the Michigan levy "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id.* at 817. *Davis* "held that the United States had not consented under 4 U.S.C. § 111 to this discriminatory imposition of a heavier tax burden on federal benefits than on state and local benefits." *Harper v. Virginia Dept. of Taxation,* 509 U.S. ——, 125 L.Ed.2d 74, 82 (1993) (footnote omitted). Likewise, the United States has not consented to a discriminatory imposition of a heavier tax burden on the compensation for personal services of federal law enforcement officers.

The exclusion of income from taxation in issue here, granted in ALA. CODE § 36-21-2(b) (1975), is, in all material respects, identical to the exemption provided for income from state employees' pensions contained in ALA. CODE § 36-27-28 (1975). This latter provision has been specifically noted by this Court as giving "preferential tax treatment to benefits received by employees of state and local governments relative to the tax treatment of benefits received by federal employees." *Harper v. Virginia Dept. of Taxation*, 509 U.S. ——, 125 L.Ed.2d at 83. It was found unconstitutional in *Sizemore v. Rinehart*, 611 So.2d 1064, 1067 (Ala. Civ. App. 1992) to limit that exemption exclusively to state employees and not federal employees, but Alabama's state courts have not applied the same principle to the exclusion in issue here, ALA. CODE § 36-21-2(b) (1975).

In this case it is without question that a federal law enforcement officer will have "a heavier tax burden on [his] federal benefits" than a state counterpart will have on his state benefits, all else being equal. If, for example, a state law enforcement officer receiving the additional compensation provided in ALA. CODE § 36-21-2(a) (1975), and a federal law enforcement officer, receive exactly the same "gross income" as that term is defined in ALA. CODE § 40-18-14(1) (1975), and if these two law enforcement officers have identical tax situations with respect to marital status, exemptions, deductions and other tax significant facts, the federal employee will pay more state income tax than the state counterpart.

States have the power to tax the wages of federal employees only in a nondiscriminatory manner. States may not impose discriminatory taxation on the federal government. *McCulloch v. Maryland*, 4 Wheat. 316, 330 (1819). The basis of this decision was that state taxation of a federal instrumentality would unconstitutionally interfere with the exercise of the federal government's delegated powers. *Davis v. Michigan Dept. of Treasury*, 489 U.S.

at 810. As it relates to governmental salaries, "the purpose of the immunity was . . . to prevent undue interference with the one government by imposing on it the tax burdens of the other." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 483-484 (1939). A nondiscriminatory taxation scheme does not impose one government's burdens on another. *Id.* at 487. However, "a State may not single out those who deal with the [Federal] Government . . . for a tax burden not imposed on others similarly situated." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. at 383.

Alabama's state individual income tax taxes all the compensation for services received by federal law enforcement officers, but excludes some compensation for services of some state law enforcement officers. This scheme singles out federal law enforcement officers for a tax burden not imposed on state employees similarly situated, directly contravening the holding in *Phillips Chemical Co.* The Alabama state income tax treats those who deal with the federal government less well than those with whom it deals itself. The class of over 800 federal officers asks only that its members be treated equally with their state counterparts.

It is important that this Court not allow the Alabama courts to engage in a latter day nullification to avoid this Court's holdings in *Davis v. Michigan Dept. of Treasury*, and *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*

III. ENLARGING AND EXPANDING DISCRIMINATION

When the Act of May 15, 1984, No. 84-306, 1984 ALA. ACTS 679 first enacted the exclusion from state income tax as a part of ALA. CODE § 36-21-2(b) (1975), it affected the employees of six (6) state agencies and excluded $8.00 per day from taxable income. A-20a. The next year another agency was added to the list by Act of May 29, 1985, No. 85-754, 1985 ALA. ACTS 1254. A-22a. The Act of July 2, 1987, No. 87-344,

1987 ALA. ACTS 508 added four more agencies. A-25a. Another agency joined the list the next month with the adoption of Act of Aug. 13, 1987, No. 87-814, 1987 ALA. ACT: 1625. A-27a. After this case was filed, Act of Apr. 22, 1994, No. 94-595, 1994 ALA. ACTS 1102 added still another agency to bring the total to thirteen. A-28a. After the announcement of the decision sought to be reviewed in this case, the amount of the exclusion was increased by Act of May 29, 1997, No. 97-720, 1997 ALA. ACTS —— from $8.00 per working day to $12.00 per working day. A-30a to A-31a. The tax benefit to state officers increased thereby.

Alabama's marginal tax rate is 5%. ALA. CODE § 40-18-5 (1975). Prior to the 1997 amendment state officers received about $100.00 per year tax advantage, assuming 250 working days in a year. Now their state income tax advantage over federal officers is $150.00 per year.

The political reality is that the number of favored state employees and the amount by which they are favored will continue to grow until restrained by a proper application of existing legal precedents. It is important that this Court provide this restraint.

CONCLUSION

It is a conscious practice in some states to enact taxes that are questionable constitutionally and then to play what they call the "certiorari lottery." This is what Alabama is doing in this case. If Alabama wins the "lottery," it will be financing some of its operations by exacting a disproportionate tax payment from federal employees. It will have wounded the Public Salary Tax Act with a wound which will fester as the discrimination expands and enlarges. It is important to the performance of the federal law enforcement function in Alabama that the writ issue to halt the state's incursion on federal authority.

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. SIZEMORE, JR.*
Attorney at Law
461 South Court Street
Montgomery, AL 36104
(334) 265-1121
Attorney for Petitioners

* Counsel of Record

November 19, 1997

APPENDIX A

Mar. 14, 1997

ALABAMA
COURT OF CIVIL APPEALS
OCTOBER TERM, 1996-97

2951068

ROY C. CHEATHAM, *et al.*

v.

RALPH P. EAGERTON, as commissioner, *et al.*

Appeal from Montgomery Circuit Court
(CV-94-290)

YATES, Judge

The plaintiffs, on behalf of a class of more than 800 federal law enforcement officers, sued the State of Alabama commissioner of revenue, seeking a judgment declaring that the State law enforcement officers' $8-per-day subsistence allowance exemption from Alabama income tax, pursuant to § 36-21-2(b), Ala. Code 1975, creates a discriminatory tax scheme in violation of the intergovernmental tax immunity doctrine and 4 U.S.C.A., § 111 (West 1985) (the Public Salary Tax Act of 1939). The plaintiffs moved for a summary judgment. The parties entered a joint stipulation of facts, agreeing that the issue

could be resolved as a matter of law. The court entered a summary judgment in favor of the commissioner; the plaintiffs appeal.

The undisputed facts are as follows: All employees of the State of Alabama are paid according to the Merit System Act. §§ 36-26-1 through -108, Ala. Code 1975. Certain state law enforcement officers receive an $8-per-working-day subsistence allowance, pursuant to § 36-21-2(a). Section 36-21-2(b) specifically exempts the allowance from Alabama income tax.

In 1977, the Alabama Legislature enacted a joint resolution stating that the subsistence allowance was never intended to be compensation. According to the resolution, the allowance was intended as a reimbursement for meal expenses incurred while the officers are on duty. The legislature recognized that officers' duties routinely removed them from their home base, thereby necessitating the purchase of meals. Act No. 763, 1973 Regular Session (Ala. Acts 1973, p. 1145).

The plaintiffs do not receive any form of daily subsistence allowance that is comparable to the state officers' allowance. The plaintiffs, however, are reimbursed per diem for business travel expenses. The state officers also receive travel reimbursement, in addition to the subsistence allowance. Neither the plaintiffs nor the state officers are taxed on their per diem reimbursements.

The dispositive issue is whether the tax scheme at issue violates the doctrine of intergovernmental tax immunity and 4 U.S.C.A., § 111.

The intergovernmental tax immunity doctrine is a core tenet of federalism that prevents either the Federal Government or the state governments from directly taxing the activities of the other. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). "[U]nder current intergovernmental tax immunity doctrine the States can never tax the United States directly but can tax any private

parties with whom it does business . . . as long as the tax does not discriminate against the United States or those with whom it deals." *South Carolina v. Baker*, 485 U.S. 505, 523 (1988). Section 111, 4 U.S.C.A., provides, in part, that states may tax the pay of federal employees for personal services if such taxation does not discriminate because of the "source" of the compensation.

In *Davis*, the United States Supreme Court considered the validity of Michigan's income taxation of Federal Government benefits, based on the intergovernmental tax immunity doctrine and § 111. Under Michigan's tax scheme, the retirement benefits received by former state and local government employees were exempt from Michigan income tax, but the retirement benefits received by all other persons, including former employees of the Federal Government, were subject to Michigan tax. The Supreme Court held that § 111 and the intergovernmental tax immunity doctrine forbids Michigan from treating federal and state retirement income differently for tax purposes.

Subsequently, in *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *cert. quashed*, 611 So. 2d 1069 (Ala. 1993), this court held that Alabama's income taxation of military retirement benefits violated § 111 and the doctrine of intergovernmental tax immunity.

The plaintiffs rely on the same analysis applied in *Davis* and *Rinehart* to support their position. We, however, are of the opinion that the situation here is not analogous to the situation in either *Davis* or *Rinehart*.

It is undisputed that the plaintiffs do not receive a comparable daily subsistence allowance from the Federal Government. It is also undisputed that the regular merit system salary of the state officers is taxed the same as the regular pay of the plaintiffs. Alabama is not giving differential tax treatment based on the "source" of the income. It simply is not giving a tax credit to law enforcement officers for pay not received.

In entering the summary judgment in favor of the commissioner, the court concluded:

> "The inter-governmental tax immunity doctrine requires States to treat both federal and state employees the same but it does not require a State to give tax credits to employees for compensation not actually received by them. The Alabama Legislature chose to provide certain law enforcement officers with an additional allowance and the federal government has not. Whether or not federal law enforcement officers are given such benefits is in the province of the federal government and not state government or this Court. Of course, if they did receive such an allowance the State of Alabama would be required to give the same tax benefits to them as provided to state law enforcement officers."

We find the court's order to be sound and well reasoned. We agree that the tax scheme in question does not discriminate because of the "source" of the pay or compensation and, therefore, does not violate the intergovernmental tax immunity doctrine or § 111.

AFFIRMED.

Robertson, P.J., and Monroe, Crawley, and Thompson, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

CV-94-290-GR

PAMELA C. HARDING, *et al.*,
Plaintiffs,

v.

RALPH P. EAGERTON, JR., as Commissioner of the Alabama Department of Revenue.
Defendant.

FINAL ORDER

This action was brought pursuant to the Alabama Declaratory Judgment Act, Code of Alabama 1975, Sec. 6-6-220, et seq. Plaintiffs are seeking to have a determination made as to the construction of Sec. 36-21-2, Code, and its applicability to federal law enforcement officers. More specifically, Plaintiffs claim they are entitled to the same state income tax exemption received by state law enforcement officers for a $8.00 per day subsistence allowance provided to them by this statute. They also seek a refund and an injunction prohibiting the Department of Revenue from continuing to collect $8.00 per working day of their salaries.

Plaintiffs filed a Motion for Summary Judgment and the attorneys for the parties were present at the date and time scheduled for hearing. All of the parties stipulated and agreed in open Court that there were no disputed issues as to any material facts and that the issues before the Court could be resolved as a matter of law. The parties also stipulated that the constitutionality of Sec.

36-21-2, Code, is not in issue and is not contested. Furthermore, Plaintiffs are not challenging the right of the Alabama Legislature to grant an exemption to state employees.

On June 20, 1995 this Court certified this case as a class action and the class was defined as follows:

> All individuals employed by the United States of America, or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during any of the calendar years 1990, 1991, 1992, 1993, 1994, or 1995, and have, without a concluded final assessment determining tax liability, either paid Alabama state income tax thereon for any of the calendar years 1990, 1991, 1992, 1993, 1994, or 1995, or incurred potential Alabama state income tax liability for any of those calendar years.

Subsequently the Court granted motions to intervene by the Alabama State Police Association and the Alabama State Trooper Association, Inc. There was also substitution, in part, of the original plaintiffs and defendant and additional plaintiffs were named as members of the class.

Plaintiffs claim that there is a discriminatory tax scheme in violation of 4 U.S.C. Sec. 111 as a result of their not being given the same exemption afforded certain state law enforcement officers pursuant to Sec. 36-21-2, Code. At the outset it should be noted that the power to tax, or exempt certain income from taxation, is essentially a legislative function. See *Haden v. Watson*, 117 So.2d 694 (Ala. 1960).

Sec. 36-21-2, Code, was enacted in 1973 and provides that state law enforcement officers employed by certain departments and investigators employed by district attorneys on a full-time basis are to receive a subsistence allowance of $8.00 for each working day while engaged in the

performance of duties. This allowance is in addition to all other compensation, expenses and allowances. This statute also provides that the subsistence allowance shall not be subject to income tax.

Over the years the statute has been amended to add to the list of state law enforcement officers who are eligible to receive subsistence pay. However, correctional officers are phased in over eight years and subject to limitations. No specific mention was made as to taxation of this allowance until 1977 when a Joint Resolution, Act. No. 27 (Acts of 1973, p. 1145), was adopted setting forth the legislative intent. This resolution provided that the subsistence pay was an expense allowance to provide meals for officers on duty, that it was not to be considered as compensation and was not subject to federal or state income tax. In 1986, it was amended and 36-21-2(b), Code, now provides for the exclusion of the allowance from taxation.

Sec. 40-18-14, Code, defines "gross income" as including "gains, profits and income derived from salaries, wages, or compensation for personal services including the salaries, income, fees, and other compensation of state employees. It also includes income from any source not exempted by the income tax chapter and against which income there is no provision for a tax. Subsistence meal allowance constitute income for federal tax purposes. *Commissioner v. Kowalski*, 434 U.S. 77, 98 S. Ct. 315, 54 L.Ed.2d 252 (1977) and *County Com'n v. FOP, Lodge No. 64*, 558 So.2d 893 (Ala. 1989). State law enforcement officers pay federal income tax on the allowance and also may take job related expense deductions to off set the amount they receive.

Regarding other expenses received by law enforcements officers, federal employees are reimbursed per diem for travel both in-state and out-of-state. The amount received for travel is dependent in part on the location, number of

travel hours and there is one amount set for lodging and a separate amount set for meals and incidentals. State employees, including law enforcement officers, also receive travel reimbursement expenses. Travel reimbursement payments are not considered as part of either state or federal employees' income and neither are taxed on such reimbursements.

4 U.S.C. Sec. 111 provides, in part, that States may tax the pay of federal employees for personal services if such taxation does not discriminate because of the *source* of the compensation. In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989), it was held that Michigan's income tax scheme violated 4 U.S.C. Sec. 111 by fully taxing federal pensions and exempting state retirement benefits. Subsequently, in *Sizemore v. Rinehard*, 611 So.2d 1064, (Ala. Civ.App. 1992), it was held that Alabama's income taxation of military retirement violated 4 U.S.C. Sec. 111 and the doctrine of intergovernmental tax immunity. Refunds were ordered to be paid to the plaintiff classes and in response to *Davis* the Alabama Legislature remedied the matter by granting the same exemption to federal retirees. The Court would also note that the Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, 40-2A-1 et. seq., Code, was enacted in 1992 which now contains procedures for taxpayers to obtain refunds. There is no evidence that any of the plaintiff class here has sought refunds.

The only issue before this Court is whether there is a violation of the intergovernmental tax immunity doctrine here. In both *Davis* and *Sizemore* the only difference in the retirees was the source of their retirement income. Those who received retirement income from the States received some exemptions while those who received the same type of income from the federal government did not. However, the Court is of the opinion that the situation here is not analogous to *Davis* or *Sizemore*.

In this case it is undisputed that federal law enforcement officers do not receive a comparable daily subsistence allowance from the federal government. It is also undisputed that the regular merit system salary of state law enforcement officers is taxed the same as the regular pay of federal law enforcement officers.

Plaintiffs contend that as law enforcement officers they meet all of the criteria of the statute and, therefore, are entitled to the state income tax exemption in that amount. However, only those state law enforcement officers enumerated receive subsistence pay. Neither state employees in general nor law enforcement officers in general receive the allowance and except for district attorney investigators other local law enforcement officers do not receive it. Suffice it to say that plaintiffs here do not meet the criteria as they are not in the class of employees the legislature has chosen to provide such additional allowance and tax exemption.

The State of Alabama is not giving differential tax treatment based on the *source* of income. It is simply not giving credit to law enforcement officers for pay not received by them. The inter-governmental tax immunity doctrine requires States to treat both federal and state employees the same but it does not require a State to give tax credits to employees for compensation not actually received by them. The Alabama Legislature chose to provide certain law enforcement officers with an additional allowance and the federal government has not. Whether or not federal law enforcement officers are given such benefits is in the province of the federal government and not state government or this Court. Of course, if they did receive such an allowance the State of Alabama would be required to give the same tax benefits to them as provided to state law enforcement officers.

In conclusion, the Court finds that the tax scheme in question does not discriminate because of the source of

the pay or compensation and, therefore, it is not violative of 4. U.S.C. Sec. 111. The Court has limited this decision to the sole issue before it and because this ruling is dispositive of this action it is not necessary to address any other possible legal consequences of the statute involved.

Finally, the Court is mindful that Plantiffs filed the Motion for Summary Judgment, however, since there are no disputed issues of fact and the parties have stipulated it can be resolved as a matter of law summary judgment is due to granted in favor of Defendant. In accord: *Adam v. Shelby County Com'n.*, 415 So.2d 1066 (Ala. 1982).

Wherefore, it is hereby ORDERED as follows:

1. That there exists a justiciable controversy between the parties appropriate for declaratory relief and it is further ORDERED that federal law enforcement officers are not entitled to a state income tax exemption for the subsistence allowance received by certain state law enforcement officers pursuant to Sec. 36-21-2, Code of Alabama 1975.

2. That Plaintiffs' request for refunds and to enjoin the Department of Revenue from taxing $8.00 per working day of their salaries is due to be and is hereby denied.

3. That judgment is hereby entered in favor of Defendant Commissioner of the Alabama Department of Revenue.

4. That costs of this matter are hereby taxed against plaintiffs.

Done this 14th day of May, 1996.

/s/ Sally Greenhaw
SALLY GREENHAW
Circuit Judge

Counsel of Record

APPENDIX C

May 09, 1997

THE COURT OF CIVIL APPEALS
OF ALABAMA

RE: 2951068

ROY C. CHEATHAM, *et al.*

v.

RALPH P. EAGERTON, as Commisioner, *et al.*

(Appeal from Montgomery County Circuit Court:

CV 94-290)

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing. 39(k) Motion Denied.

/s/ John H. Wilkerson, Jr.
JOHN H. WILKERSON, JR.,
Clerk
Court of Civil Appeals

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

August 22, 1997

1961370

EX PARTE ROY C. CHEATHAM, *et al.*

Petition for Writ of Certiorari to the Court of Civil Appeals (In re: Roy C. Cheatham, et al. v. Ralph P. Eagerton, as Commissioner, et al.) (2951068) (Montgomery: CV-94-290)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PER CURIAM—Hooper, C.J., Maddox, Almon, Shores, Houston, Kennedy, Cook, Butts and See, JJ., concur.

APPENDIX E

CONSTITUTION OF THE UNITED STATES

ARTICLE VI.—MISCELLANEOUS PROVISIONS

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX F

4 U.S.C. § 111

§ 111. Same; taxation affecting Federal employees; income tax

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

APPENDIX G

1975 ALABAMA CODE

§ 36-21-2. Subsistence allowance for certain law enforcement officers.

(a) Any law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board, probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capitol Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of twelve dollars ($12) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

(b) The subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the 12 years beginning October 1, 1995. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the imple-

mentation of the one dollar ($1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended.

(d) The additional subsistence allowance added pursuant to Act 97-720 for all law enforcement officers listed in subsection (a), but excluding those officers listed in subsection (c), shall become effective October 1, 1997.

APPENDIX H

1975 ALABAMA CODE

§ 40-18-2. Levied; persons and subjects taxable generally.

In addition to all other taxes now imposed by law, there is hereby levied and imposed a tax on the entire net income, as defined in this chapter, which tax shall be assessed, collected, and paid annually at the rate specified herein, upon the net taxable income for each calendar year as hereinafter provided. Persons and subjects taxable under this chapter are:

(1) Every individual residing in Alabama;

(2) Every corporation domiciled in Alabama or licensed or qualified to transact business in Alabama;

(3) Every corporation doing business in Alabama or deriving income from sources within Alabama, including income from property located in Alabama;

(4) Every resident individual or corporation acting in a fiduciary capacity;

(5) Every estate and trust resident in the State of Alabama;

(6) Every nonresident individual receiving taxable income from property owned or business transacted in Alabama;

(7) Every natural person domiciled in the State of Alabama, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be presumed to be residing within the state for the purposes of determining liability for income taxes under this chapter.

APPENDIX I

Act No. 763 H. 286—Adams, Hearn, Snell

AN ACT

To provide subsistence allowances for law enforcement officers while on duty and to authorize expenditure of funds for that purpose.

Be It Enacted by the Legislature of Alabama:

Section 1. Any State law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, or Department of Agriculture and Industries shall receive a subsistence allowance of Five Dollars ($5.00) for each working day of a pay period while engaged in and in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided for such officers.

Section 2. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this Act are repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the governor, or upon its otherwise becoming a law.

Approved September 5, 1973.

Time: 5:30 p.m.

Act No. 99 S. 100—Gilmore

AN ACT

To amend Act No. 763, Regular Session, 1973, which relates to subsistence allowances for law enforcement officers while on duty and to authorize expenditure of funds for that purpose.

Be It Enacted by the Legislature of Alabama:

Section 1. Any State law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, or the Transportation Enforcement Division of the Alabama Public Service Commission shall receive a subsistence allowance of Five Dollars ($5.00) for each working day of a pay period while engaged in and in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided for such officers.

Section 2. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 3. All laws or parts of laws which conflict with this Act are repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved November 14, 1975.

Time: 2:45 P.M.

Act No. 84-306 H. 294—Reps. Biddle, Trammell, Payne, Pratt

AN ACT

To amend Section 36-21-2. Code of Alabama 1975, to increase the subsistence allowance paid to any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama Department of Forensic Sciences or the transportation enforcement division of the Alabama public service commission from $5.00 per day to $8.00 per day.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"Section 36-21-2. (a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama Department of Forensic Sciences or the transportation enforcement division of the Alabama public service commission shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on duty, and is not to be considered as compensation under the laws of this

state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved May 15, 1984.

Time: 2:15 P.M.

Act No. 85-754 H. 542—Rep. Holley

AN ACT

Relating to the subsistence allowance for certain law enforcement officers: to amend Section 36-21-2. Code of Alabama 1975, so as to provide that investigators employed by district attorneys shall be paid such allowance; and to make a supplemental appropriation for fiscal year 1985-86 to cover the cost.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2. Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) It is the legislative intent of the legislature that the subsistence allowance provided by this section is to be solely a subsistence expense allowance for purpose of providing meals while said officers are on duty, and is not to be considered as compensation under the laws of this state. It is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. There is hereby appropriated from the General Fund the amount necessary to fund the provisions of this act for fiscal year 1985-86.

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved May 29, 1985

Time: 8:00 P.M.

Act No. 86-433 H. 472—Rep. Browder

AN ACT

To amend Section 36-21-2 of the Code of Alabama 1975, relating to subsistence allowance for certain law enforcement officers, so as to provide further for such allowance.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2. (a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverages control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This Act shall become effective upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved April 29, 1986

Time: 3:30 P.M.

Act No. 87-344 H. 139—Reps. Adams and Flowers

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, relating to the subsistence allowance for certain specified law enforcement officers, so as to extend the subsistence allowance provided therein to probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, and law enforcement officers of the state capitol police; and to make this act retroactive to January 21, 1987.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, law enforcement officers of the state capitol police or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This act shall become effective retroactive to January 21, 1987.

Approved July 2, 1987

Time: 9:10 A.M.

Act No. 87-814 S. 345—Senator Foshee

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, which provides for subsistence allowance for certain law enforcement officers, so as to provide a subsistence allowance for any law enforcement officer of the state of Alabama who is employed by the Liquefied Petroleum Gas Board.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, Alabama Liquefied Petroleum Gas Board or any investigator employed by a district attorney on a full-time basis, shall receive a subsistence allowance of $8.00 for each working day of a pay period while engaged in the performance of his duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses and allowances provided for such officers.

"(b) This subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government."

Section 2. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved August 13, 1987

Time: 2:42 P.M.

Act No. 94-595 S. 103—Senator J. Smith

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, to provide further for the subsistence allowance of law enforcement officers to include on a graduated basis officers with the Department of Corrections.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is hereby amended to read as follows:

"§ 36-21-2.

"(a) Any state law enforcement officer of the state of Alabama who is employed by the department of public safety, department of industrial relations, department of conservation and natural resources, Alabama alcoholic beverage control board, department of agriculture and industries, Alabama department of forensic sciences, the transportation enforcement division of the Alabama public service commission, Alabama liquefied petroleum gas board or probation and parole officers of the Alabama board of pardons and paroles, fire marshals of the department of insurance, revenue enforcement officers of the department of revenue, law enforcement officers of the state capitol police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of eight dollars ($8) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

"(b) The subsistence allowance shall not be subject to any income or other taxes levied by the state of Alabama or the federal government.

"(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the eight years beginning with the effective date of this act. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the implementation of the one dollar (1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended."

Section 2. The provisions of this amendatory act shall be implemented with the fiscal year beginning October 1, 1995.

Section 3. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

Approved April 22, 1994

Time: 4:35 P.M.

Act No. 97-720 S. 53—Senators Biddle, Dixon, Waggoner, Mitchem, Amari, Smith, and Davidson

AN ACT

To amend Section 36-21-2, Code of Alabama 1975, to provide further for the subsistence allowance for certain law enforcement officers.

Be It Enacted by the Legislature of Alabama:

Section 1. Section 36-21-2, Code of Alabama 1975, is amended to read as follows:

"§ 36-21-2.

"(a) Any law enforcement officer of the State of Alabama who is employed by the Department of Public Safety, Department of Industrial Relations, Department of Conservation and Natural Resources, Alabama Alcoholic Beverage Control Board, Department of Agriculture and Industries, Alabama Department of Forensic Sciences, the Transportation Enforcement Division of the Alabama Public Service Commission, Alabama Liquefied Petroleum Gas Board, probation and parole officers of the Alabama Board of Pardons and Paroles, fire marshals of the Department of Insurance, revenue enforcement officers of the Department of Revenue, law enforcement officers of the State Capitol Police, any investigator employed by a district attorney on a full-time basis, or correctional officers of the Department of Corrections shall receive a subsistence allowance of twelve dollars ($12) for each working day of a pay period while engaged in the performance of the duties as a law enforcement officer. This allowance shall be in addition to all other compensation, expenses, and allowances provided those officers.

"(b) The subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

"(c) The act adding this amendatory language regarding the Department of Corrections correctional officers shall be phased-in in the amount of one dollar ($1) per fiscal year for the 12 years beginning October 1, 1995. In any year that it is determined by Senate Joint Resolution or House Joint Resolution enacted by both houses and signed by the Governor that because of fiscal emergency the implementation of the one dollar ($1) per fiscal year shall be suspended for that year only, this subsistence allowance, or any portion thereof, may be suspended.

"(d) The additional subsistence allowance added pursuant to this 1997 amendatory act for all law enforcement officers listed in subsection (a), but excluding those officers listed in subsection (c), shall become effective October 1, 1997."

Section 2. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

Approved May 29, 1997

Time: 5:22 P.M.

APPENDIX J

CIRCUIT COURT
MONTGOMERY COUNTY, ALABAMA

Civil Action No. ——

PAMELA C. HARDING, CHRISTOPHER L. HARDING, and WALTER J. BAMBERG, individually, and as representatives of the class,

Plaintiffs,

v.

GEORGE E. MINGLEDORFF III, Commissioner of the Alabama Department of Revenue,

Defendant.

COMPLAINT

1. Plaintiffs, Walter J. Bamberg, a resident citizen of Montgomery County, Alabama, and Pamela C. Harding and Christopher L. Harding, resident citizens of Chilton County, Alabama, are over the age of nineteen (19) years and have, during the calendar years 1990, 1991, 1992, and 1993, received wages from the government of the United States of America for services as a law enforcement officer, and have paid Alabama state income tax on such wages.

2. Defendant, Honorable George E. Mingledorff III, is the Commissioner (Acting) of the Alabama Department of Revenue (hereinafter referred to as "Department"), and is charged by law with the complete supervision and control of the application and enforcement of the tax laws of the State of Alabama pursuant to §§ 40-2-40 and 40-2-11, Code of Alabama 1975, and other relevant provisions of law.

3. The Plaintiffs bring this action on behalf of themselves and all members of a class of Plaintiffs composed of all individuals employed by the United States of America or any of its agencies, as law enforcement officers, who earned wages in Alabama for such employment during calendar years 1990, 1991, 1992 or 1993, and have either paid Alabama state income tax thereon for any of the calendar years 1990, 1991, 1992, or 1993 or have a potential state income tax liability for any of those calendar years.

4. With respect to the propriety of a class action, the Plaintiffs aver the following:

(a) The class is so numerous that joinder of all its members would be impracticable;

(b) There are questions of law and fact common to the class, such as the legality of the application of State income taxes to a portion of the wages of the class members and the right of such class members to receive a refund for past payment of taxes on such income;

(c) Plaintiffs' claim is typical of claims of the class;

(d) In their representative capacity, the Plaintiffs will fairly and adequately protect the interests of the class;

(e) The prosecution of separate actions by the individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the Defendant herein;

(f) Defendant has acted or refused to act on grounds generally applicable to the class; thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole;

(g) Questions of law and fact common to the members of the class predominate over any question affecting only individual members, and that a class action is su-

perior to the other available methods for the fair and efficient adjudication of this controversy;

(h) The prosecution of separate actions by individual members of the class would create risk of adjudications for the respective individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(i) Failure to allow this cause to be maintained as a class action will result in many members of the class being unable to assert the rights requested herein in a timely fashion and would effectively deny the opportunity of such members to recover part or all of the taxes paid under an illegal and void taxation scheme.

5. Plaintiffs, on behalf of themselves and members of the class, seek a declaration pursuant to the Alabama Declaratory Judgment Act contained in Article 5 of Title 6, Code of Alabama 1975, to determine the construction and applicability of Alabama law and certain regulations of the Alabama Department of Revenue applying state income tax to wages of law enforcement officers employed by the United States of America or by its agencies; and to order relief in the form of an injunction prohibiting the collection of such taxes in the future and the reimbursement of all taxes collected pursuant to such statutes and regulations.

6. Plaintiffs aver that the Legislature of the state of Alabama, by and through § 40-18-2, has "levied and imposed a tax on the entire net income . . . [of]:

"(1) Every individual residing in Alabama;

. . .

"(6) Every nonresident individual receiving taxable income from property owned or business transacted in Alabama," but has, by and through § 36-21-2(b), Code

of Alabama 1975, as amended, granted an exemption from Alabama state income taxation to certain law enforcement officers employed by several agencies of the state of Alabama for that portion of their pay established by § 36-21-2(a) in the amount of "$8.00 for each working day . . . while engaged in the performance of his duties as a law enforcement officer." No such exemption exists for federal law enforcement officers and full state income taxation is applied by the Department to all wages of such federal officers.

7. Pursuant to § 40-18-2, the Department has promulgated regulations applying state income taxes to the entire wages of federal law enforcement officers, but exempting the state law enforcement officers described in § 36-21-2(a), Code of Alabama 1975, from wages totalling $8.00 per day. The regulations addressing state law enforcement officers provide as follows:

> Reg. 810-3-14-.02. Exclusions from Gross Income
>
> (1) Sec. 40-18-14(2) lists items which are not to be included in gross income. In addition to these items, items of income which Federal law prohibits the states from taxing, or which are exempt from taxation by the State of Alabama, are excluded from gross income.
>
> * * * *
>
> (b) 1. EXAMPLE: Under various other Alabama statutes, the daily subsistence allowances paid to state law enforcement officers, . . . are excluded from gross income.
>
> 2. EXAMPLE: Effective for payments received after January 20, 1987, the daily subsistence allowance paid pursuant to [§]36-21-2 to probation and parole officers of the Alabama Board of Pardons and Paroles, to fire marshals of the Department of Insurance, to enforcement officers of this [the Revenue] Department and to law enforcement officers of the

State Capitol Police, are also excluded from gross income.

8. Plaintiffs, individually and on behalf of the class, contend that $8.00 per working day of wages for federal law enforcement officers, is exempt from state taxation pursuant to Section 111 of the Public Salary Tax Act of 1939, 4 U.S.C. § 111 (hereinafter referred to as the "Act") and the constitutional doctrine of intergovernmental tax immunity. Specifically, Plaintiffs claim that taxation of the wages of the class members as described, does not fall within the limited consent to state taxation granted by Congress in the Act, which, in relevant part, provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

9. The full taxation of the wages of federal law enforcement officers represents a discriminatory taxation scheme and does not fall within the exception granted by the Act, and, therefore, is violative of the constitutional doctrine of intergovernmental immunity, due to the fact that the state of Alabama provides a partial exemption from state income taxation to law enforcement officers employed by the state or its agencies. Such taxation also violates the mandate of § 40-18-3, Code of Alabama 1975, which provides:

> The salaries, fees commissions or other income of officers or agents of the United States or its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, *but without discrimination, and only to the*

same extent and in the same manner as other income is taxed. . . .

(emphasis supplied).

10. Plaintiffs submit that a justiciable controversy exists between George E. Mingledorff III, as Commissioner (Acting) of the Department of Revenue and the members of the class, including themselves. The justiciable controversy arises from Plaintiffs' contention that, contrary to the provisions of Alabama law, $8.00 per working day of the wages of law enforcement officers employed by the United States of America and its agencies, are not within the subjects of taxation permitted by 4 U.S.C. § 111, and the taxation thereof violates the Constitution and laws of the United States of America, requiring refunds to be granted.

11. The aforementioned state statute and the Department of Revenue regulations unconstitutionally tax federal compensation which is exempt from taxation and, therefore, are void and illegal. Plaintiffs challenge the legality of the aforementioned statutes and regulations in their entirety, not as they apply to a particular taxpayer.

12. Plaintiffs and members of the class have incurred tax liability to Defendant arising out of the assessment and collection of state income taxes on the salary of federal law enforcement officers, while the salaries of certain state law enforcement officers have been partially exempt, since 1988 or earlier.

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiff seeks the following relief against the Defendant:

1. An order pursuant to Rule 23(c)(1), A. R. Civ. P., allowing this cause to be maintained as a Plaintiff class action against the Defendant and further that the Court will allow such other orders as may be necessary and proper in the premises;

2. A judgment declaring that the state taxation of $8.00 per working day of the salary of federal law enforcement officers is illegal and void;

3. A permanent injunction against the Defendant from applying and collecting Alabama state income tax on that portion of the salaries of the Plaintiff class referred to;

4. An order requiring the Defendant to refund to the Plaintiff and members of the class all state income tax collected on that portion of their salaries on which such tax has been collected illegally;

5. An order requiring Defendant to pay Plaintiffs' attorneys a reasonable fee for representing the Plaintiffs and members of the class in the prosecution of this cause and for interest and costs;

6. Such further and different relief, whether legal or equitable, to which Plaintiffs and the class are justly entitled.

/s/ James M. Sizemore, Jr.
JAMES M. SIZEMORE, JR.

Of Counsel:

Capouano, Wampold, Prestwood &
Sansone, P.A.
350 Adams Avenue
Montgomery, Alabama 36104
Telephone: (205) 264-6401

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No. 97-841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ROY C. CHEATAM, and 72 other class members for themselves and the class of more than 800 federal law enforcement officers,

Petitioners,

v.

H.E. MONROE, JR., as Commissioner of the Alabama Department of Revenue; DOUG NELSON, individually and as President of the Alabama State Police Association; and STEVE WOLFE, individually and as President of the Alabama State Trooper Association, Inc.,

Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama

BRIEF IN OPPOSITION OF RESPONDENTS ALABAMA STATE POLICE ASSOCIATION AND ALABAMA STATE TROOPERS ASSOCIATION

MARK D. WILKERSON *
Attorney at Law
405 South Hull Street
Montgomery, AL 36101-0830
(334) 265-1500
Attorney for Respondent Alabama State Police Association

E. HAMILTON WILSON, JR.
Attorney at Law
60 Commerce Street, Suite 1100
Montgomery, AL 36102-2148
(334) 834-7680
Attorney for Respondent Alabama State Troopers Association

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether the State of Alabama may grant an exemption from state income tax for a per diem expense allowance provided to its law enforcement officers that is reasonably related to expenses likely to be incurred due to the nature of their employment, if the State also grants an exemption for per diem expense allowances received by federal law enforcement officers. *Ragsdale v. Dept. of Revenue*, 895 P.2d 1348 (Or. 1995), *cert. denied*, 116 S.Ct. 569 (1995); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989); *Sheehy v. Public Employees Retirement Div.*, 864 P.2d 762 (Mont. 1993); *Filios v. Commissioner of Revenue*, 615 N.E.2d 933 (Mass. 1993), *cert. denied*, 511 U.S. 1030 (1994).

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IN THE

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ROY C. CHEATAM, and 72 other class members for themselves and the class of more than 800 federal law enforcement officers,

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Respondents.

On Petition for Writ of Certiorari to the Court of Civil Appeals of Alabama

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BRIEF IN OPPOSITION OF RESPONDENTS ALABAMA STATE POLICE ASSOCIATION AND ALABAMA STATE TROOPERS ASSOCIATION

ADDITIONAL STATUTORY PROVISION INVOLVED

The following statutory provision is involved in this case and is intended to supplement the Constitutional and Statutory Provisions cited by the Petitioners. The following provision is reprinted in its entirety in the Appendix at page 1a.

1977 Ala. Acts, 1438.

STATEMENT OF THE CASE

The State of Alabama has provided pursuant to ALA. CODE § 36-21-2 (1975), that certain law enforcement officers of the State of Alabama should receive a sum certain allowance each day (i.e., per diem) while in service to the State in order to pay for various work related expenses which would otherwise be absorbed by the law enforcement officers. This "subsistence allowance," adopted in 1973, is excluded from state taxation by ALA. CODE § 36-21-2(b) (1975). This section provides: "The subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government." See Petition A-15a. In 1977, the Alabama Legislature by joint resolution stated: "[I]t was and is the intent of the Legislature of the Sovereign State of Alabama that the subsistence allowance provided by Act No. 763, H 286, 1973 Regular Session (Acts of Alabama 1973, p. 1145), as amended, was to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on duty and is not considered as compensation under the laws of this state." See Response to Petition A-1a (emphasis added).[1] Recognizing the nature of this subsistence allowance, the Alabama Supreme Court has correctly referred to this payment as a "per diem stipend," *Tuscaloosa County Comm'n. v. Deputy Sheriffs' Assoc'n of Tuscaloosa County*, 632 So.2d 442, 444 (Ala. 1993), and a "per diem expenses allotment." *Deputy Sheriffs' Assoc'n. v. Tuscaloosa County Comm'n.*, 610 So.2d 1159, 1160 (Ala. 1992). This language provides additional confirmation of the intent of the Legislature regarding the nature of the per diem subsistence allowance.

Since its original enactment in 1973, the statute has been amended numerous times and for various reasons.

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[1] When a court is called upon to interpret a statute, it is the court's duty to ascertain and implement the legislative intent expressed within the statute. *Ex Parte Holladay*, 466 So.2d 956 (Ala. 1985); *McGuire Oil Co. v. Mapco, Inc.*, 612 So.2d 417 (Ala. 1992).

When the statute was amended in 1984, the Legislature increased the subsistence allowance paid to the specifically enumerated state law enforcement agencies from $5.00 per day to $8.00 per day. See Petition A-20a. Over the next few years, this statute was amended to provide funds for additional state law enforcement agencies. See Petition A-22a through A27a. The Legislature again amended this section in 1994, "to provide further for the subsistence allowance . . . to include on a graduated basis officers with the Department of Corrections." See Petition A-28a. And finally, the Legislature recently amended the language of this statute raising the $8.00 per diem allowance to $12.00 per day. See Petition A-30a.[2] The language used by the Legislature is consistent with the notion that any and all subsequent amendments to this statute did not change the fundamental nature of the payments as a per diem subsistence allowance.

Furthermore, it is not disputed that federal law enforcement officers also receive flat per diem monetary allowances to roughly cover their undocumented business related travel expenses upon which they are not taxed. The federal and state per diem travel expense allowances vary in value and amount, with the federal per diem allowance often being in excess of the state allowance amount. However, the federal law enforcement personnel do not receive any form of daily subsistence allowance that is comparable to the state officers' allowance.

The Petitioners objected to the state of Alabama's tax scheme as discriminatory and filed suit. However, the trial court recognized the fact that there are substantive differences between the per diem subsistence allowance received by the state law enforcement officers and the regular pay received by the federal Petitioners. "In both *Davis* and *Sizemore* the only difference in the retirees was the source of their retirement income. Those who received

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[2] This was the first increase in the per diem allowance since 1984.

retirement income from the States received some exemptions while those who received the same type of income from the federal government did not. However, the Court is of the opinion that the situation here is not analogous to *Davis* or *Sizemore*." See Petition A-8a. The trial court concluded, "Alabama is not giving differential tax treatment based on the *source* of income." See Petition A-9a. (emphasis in original.) Upon this ruling, the Petitioners appealed.

The Alabama Court of Civil Appeals stated that the "dispositive issue is whether the tax scheme at issue violates the doctrine of intergovernmental tax immunity and 4 U.S.C.A., § 111." See Petition A-2a. The appellate court again rightly concluded that *Davis* was not analogous to the present case and once more stated, "Alabama is not giving differential tax treatment based on the 'source' of the income. It is simply not giving a tax credit to law enforcement officers for pay not received." See Petition A-3a. In so holding, the courts noted that Alabama has never taxed the per diem allowances of federal law enforcement officers, despite the fact that such per diem allowance, like the state per diem subsistence allowance, is not tied in many instances to actual expenses. Thus, the courts concluded that state taxation of the federal income is not violative of the *Public Salary Act of 1939* or the constitutional doctrine of intergovernmental immunity.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition for Writ of Certiorari because the decision of the Alabama courts, uphold the validity of the statute in question:

(a) Is in accord with 4 U.S.C. § 111 and the principle of intergovernmental tax immunity.

(b) Is in harmony with the decisions previously rendered by this Court in *Phillips Chemical Co. v. Dumas Indep. School Dist.*, 361 U.S. 376

(1960) and *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), since Alabama does not discriminate against employees of the federal government by treating them differently from the State's own employees for tax purposes.

In *Davis*, this Court ruled that a Michigan statute that taxed federal retirement benefits but excluded state retirement benefits from taxation was discriminatory and consequently violated 4 U.S.C. § 111; *Davis* 489 U.S. 803. However, in *Davis*, it was "undisputed that Michigan's tax system discriminate[d] in favor of retired state employees and against retired federal employees." *Davis* at 814. In *Davis*, the State of Michigan sought only to justify its discrimination by providing this Court with a "rational reason" for such discrimination. *Id.* at 816. In this matter, unlike *Davis*, there is no discrimination, and what remains undisputed is the simple fact that the federal plaintiffs, like their state counterparts, do not pay any state income tax on flat-rate per diem expense allowances.

Alabama's tax laws apply equally to everyone, regardless of the "source" of the income. The fact that the federal government has failed to grant its law enforcement officers a small daily subsistence per diem allowance equal to that of the State does not render unconstitutional the State exemption. And since both the trial and appellate courts' reasoning was sound and in keeping with the established principle of intergovernmental tax immunity and the Act, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE TAXATION OF THE FEDERAL INCOME BY THE STATE OF ALABAMA DOES NOT VIOLATE THE LIMITED CONSENT TO STATE TAXATION OF FEDERAL INCOME UNDER THE PUBLIC SALARY TAX ACT.

The *Public Salary Tax Act of 1939* provides that the "United States consents to the taxation of pay or com-

pensation . . . if the taxation does not discriminate . . . because of the source of the pay or compensation." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809; 4 U.S.C. § 111. The tax laws of Alabama fully comply with all applicable federal law and this Court's holding in *Davis*.

The Petitioners assert that Alabama's state income tax scheme, which taxes the income of federal law enforcement officers, violates the constitutional doctrine of Intergovernmental Immunity and the limited consent to state taxation of federal source income granted by Congress in the *Public Salary Tax Act of 1939*, 4 U.S.C. § 111 (hereinafter referred to as the "Act"), since state law provides an exemption from state taxation for certain per diem subsistence expense payments to state law enforcement officers. However, the Act specifically allows state taxation of federal income as long as such taxation "*does not discriminate . . . because of the source of the pay or compensation.*" The Petitioners claim that this language requires a portion of their regular pay (i.e., salary) to be exempt from taxation.

The Petitioners have attempted to demonstrate, pursuant to *Davis*, that there is no substantive difference between the per diem subsistence expense allowance received by state law enforcement officers and the regular pay otherwise received by the federal law enforcement officers. Notwithstanding Petitioners' assertions, the Alabama courts have examined the evidence and logically concluded that substantial differences existed. "In this case, it is undisputed that federal law enforcement officers do not receive a comparable daily subsistence allowance from the federal government. It is also undisputed that the regular merit system salary of the state law enforcement officers is taxed the same as the regular pay of federal law enforcement officers." See Petition A-9a. The trial court also noted that only specific state law enforcement officers receive this pay. See Petition A-9a. "Neither state employees in general nor law enforcement officers in general receive

the allowance. . . ." See Petition A-9a. In other words, only the state law enforcement officers enumerated in the statute receive this allowance, and then only to the extent so provided.

Furthermore, the per diem subsistence allowance is reasonably related to expenses likely to be incurred by such state law enforcement officers due to the nature of their employment. And since the tax treatment is based on the *nature,* not the *source* of the payment, the taxation of the Petitioners' income does not violate the doctrine of intergovernmental immunity or the federal and state statutes cited by the Petitioners. Moreover, federal law enforcement officers are likewise not required to pay state income tax on any identified subsistence allowance or other flat rate expense reimbursement.

A review of the testimony of Doug Nelson, the Alabama State Police Association President, reflects that the per diem subsistence allowance was properly characterized by the legislature as a "*subsistence allowance*" and "*subsistence expense allowance*" and, in this sense, is no different from other flat per diem reimbursements received by state and federal workers which are not subject to state taxation.[3] Court Record 429-30. The intent of the stipend was to reimburse state enforcement officers for certain unique out-of-pocket costs that they are expected to absorb, which can include meals, uniform maintenance and dry cleaning, practice ammunition, etc. Court Record 429. In fact, some state law enforcement officers, such as state troopers, are continually on the road and are typically unable to return home for meals, even in those instances where they do not otherwise qualify for the state travel allowance generally available to all employees.

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[3] Indeed, one logical extension of the Petitioners' argument would be to make all other flat per diem allowances, both state and federal, subject to state income taxation.

The only Plaintiff to provide testimony in this proceeding, Mr. Gary Wright of the U.S. Customs Service, conceded that as a federal worker he also receives flat monetary allowances for certain business related expenses. As shown in his testimony, the federal law enforcement officers, regardless of whether the officers actually incurred any expense, receive these amounts. If the federal officers spend less on meals and incidentals than the flat per diem reimbursement, they realize a gain. *Under such circumstances, it is uncontroverted that Mr. Wright and the other class members do not pay state income tax on such flat "subsistence allowance," nor is there any effort underway to tax such amounts.* This demonstrates that the state does not discriminate in the taxation of amounts received by federal law enforcement officers which are intended to roughly cover undocumented business related expenses.

The Petitioners contend that the state law enforcement subsistence allowance is not comparable to the federal per diem reimbursement since it is received for every day the state officers are engaged in their law enforcement duties, regardless of whether the officer actually travels away from his or her base or receives other state reimbursement for travel expenses. It is also true that some law enforcement officers hold administrative duties and thus may not incur some of the costs identified by the Respondents, such as uniform cleaning, receive the allowance. While the Respondents agree that some state law enforcement officers may not incur, on any particular day, $12.00 in business related expenses for which they are not otherwise reimbursed, others may incur more. This fact is also true of federal officers who receive per diems. *In fact, the same problem exists to varying degrees in regard to all flat rate per diem reimbursement schemes.* While the state and federal per diem allowances vary both in amount and availability, the Respondents are aware of no authority for the proposition that allowances received by state and federal workers must be identical in all respects in order

for the state to grant a tax exemption for such allowances. In fact, *the Petitioners have cited no case or statute for the proposition that there must be no differences between federal and state per diem expense programs.* A contrary ruling would place in jeopardy the state tax exemption for all per diem reimbursements, both state and federal. The expense allowance is a reasonable approximation of certain unique, out-of-pocket expenses that can be expected to be incurred by state law enforcement officers and, therefore, is distinguishable from the salaries of federal law enforcement agencies.

At both the trial and appellate levels, the Petitioners offered a comparison of a federal law enforcement officer's state income tax return with a hypothetical return showing the tax savings if $12.00 (at that time $8.00) of the federal employee's income was excluded from taxation. The Petitioners concluded that the source of the pay is the only basis for the divergent tax treatments. This, however, is simply not so. *What was missing from the federal law enforcement officer's tax return was any reference to flat per diem allowances received by the federal employee.* Such per diem amounts were not included in the state tax return as taxable income and were not otherwise reported to or taxed by the State. It remains undisputed that the State of Alabama currently treats all per diem allowances the same, regardless of the source, regardless of the amount, and regardless of whether they are offset dollar for dollar by actual expenses.

The Petitioners also make much of the fact that the state per diem subsistence expense allowance is reported to the federal government as income.[4] It is true that the

[4] When making this argument, the Petitioners also alleged, without any substantiation, that the State employees take a deduction from thier state income taxes for the expenses intended to be covered by the per diem allowance. There remains nothing in the record or stipulated fact to support this base assertion. Moreover, if any Respondent has improperly taken a deduction for otherwise

IRS currently treats the subsistence allowance as ordinary income, subject to an offsetting deduction in those cases where a state officer documents an offsetting business related expense recognized under the federal tax code. The Respondents disagree with the manner in which the subsistence allowance is reported to the IRS and, to the Respondent's knowledge, this treatment has not yet withstood the test of a court challenge. Moreover, as is reflected in the affidavits and attached exhibits of Respondent Doug Nelson and those filed by the Alabama State Troopers Association, it is undisputed that state law enforcement officers regularly incur job related expenses for which they are not otherwise reimbursed. The IRS could determine tomorrow that all state per diem reimbursements should be taxable for federal tax purposes, except to the extent that an actual expense is documented. This would not mean, however, that the state discriminates in the manner in which it treats federal and state reimbursement. The IRS' treatment of the subsistence expense allowance is not dispositive of whether such payments are reasonably related to regular expenses incurred by state law enforcement officers and are thus distinguishable from the regular pay of the Petitioners for purposes of the Act.

II. COURTS HAVE NOT EXTENDED THE INTERGOVERNMENTAL IMMUNITY DOCTRINE TO INVALIDATE TAX SCHEMES THAT HAVE AN ADVERSE IMPACT OR NO IMPACT ON FEDERAL EMPLOYEES SIMPLY BECAUSE OF DIFFERENCES IN STRUCTURE AND AMOUNT OF THEIR PAY OR EXPENSE REIMBURSEMENT.

The Petitioners rely upon several cases that stand for the general proposition that it is impermissible for a state to treat employees of the federal government differently than it treats its own employees for taxation purposes. As

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reimbursed expenses, the Commissioner of Revenue could easily remedy this fact through the normal audit process.

is shown below, most of the cases cited by the Petitioners follow a common theme and are not applicable to the facts before this Court.

In *Barker v. Kansas,* the State of Kansas taxed the retirement benefits of retired United States military personnel but did not tax benefits of retired state and local government employees. *Barker,* 503 U.S. 594 (1992). Once again, a state had changed its tax laws so that one tax law applied to state employees while a different tax law applied to federal employees. In *Barker,* this Court held that under these facts, there were no significant differences between the two classes that justified the different tax treatment by the State of Kansas. *Id.* at 600. In a 1992 case, the fact situation presented to the Alabama Courts was similar, if not identical, to the fact situations in *Barker* and *Davis. See, Sizemore v. Rinehart,* 611 So.2d 1064 (Ala. Civ. App. 1992), *writ of cert. quashed,* 611 So.2d 1069 (Ala. 1993). Based upon this Court's holding in *Davis,* the Alabama Courts held that the state taxation scheme violated 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

Both *Sizemore* and *Barker* were grounded in the U.S. Supreme Court decision of *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803 (1989), which invalidated a Michigan tax scheme that exempted retirement income received from the State of Michigan from state taxation, while taxing retirement income received from the federal government. In *Davis,* like the other similar cases previously mentioned, the states had two different sets of rules for tax purposes for identically characterized income: one set of rules applied to federal personnel while the other set applied to state personnel. *Davis,* at 803. The case before this Court is unlike *Davis* in that there has been and remains only one set of rules that applies to all personnel, both state and federal. The rule that applies to all parties is this: *All per diem and flat rate reimbursements are not taxable income under state law, regulation and practice regardless of the source of that income.*

It is important to note that federal per diem allowances have different internal rules for qualification and availability than do state allowances. Federal and state per diem expense allowances vary in value and amount, with the federal per diem allowance often being in excess of the state allowance amount. Inevitably, different per diem allowance schemes will produce different tax consequences. The fact that the two systems have different internal rules and reimbursement rates does not necessarily operate to make the state law for per diem expense allowances discriminatory, just as it does not make the federal regulations for per diem allowances discriminatory.

In *Sheehy v. Pub. Employees Retirement Div.*, the Supreme Court of Montana was called upon to decide whether a state tax statute that phased out a $3,600 tax exemption beginning at $30,000 was constitutional. *Sheehy*, 864 P.2d 762 (Mont. 1993). The Plaintiffs, federal retirees, sought to have the statute declared unconstitutional under 4 U.S.C. § 111 as a discriminatory tax law against federal personnel based on the source of their income. *Sheehy*, 864 P.2d at 767. The Plaintiffs argued that since federal pensions were larger than that of their state counterparts, the resulting inequity amounted to discrimination based on the source of that income. *Id.* The court stated that "the controlling federal statute *does not prohibit all differences* in state taxation of state and federal pensions. Rather, it precludes taxation which discriminates against federal retirees because of the source of the pension." *Id.* (emphasis added). The differences between the amounts of the federal and state pensions when the tax law of Montana was applied resulted in different results: The federal retirees tax exemption was phased out while the state retirees exemption remained intact. In holding that Montana's tax law did not discriminate against federal retirees, the Montana Supreme Court stated that the "phase-out exemption is neutral on its face; it applies to all taxpayers equally." *Id.*

The Petitioners now reason that because Alabama law enforcement officers receive a *different* per diem expense allowance, that Alabama is discriminating against federal law enforcement officers. In fact, this Court has stated that states may impose a tax scheme with a divergent impact resulting from a difference in the amount of benefits received. *Davis* at 817; *Sheehy*, at 767. Just because there are differences does not mean there is discrimination. As long as the laws are applied equally to all classes, discrimination does not exist.

In a 1993 case, a class of military retirees brought an action under 4 U.S.C. § 111 seeking a decrease in their state income tax paid on military pensions. *See, Filios v. Commissioner of Revenue*, 615 N.E.2d 933 (Mass. 1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1538, 128 L.Ed.2d 191 (1994). The State of Massachusetts provided a state income tax exemption for contributory retirement systems. *Id.* at 934. The federal retirees did not qualify for this exemption since their retirement system was classified as non-contributory. *Id.* The State retirement system was exempt even though 90% of the state employees' retirement benefits were funded by the state government and thus were not contributory. Nevertheless, the fact that 10% of the state retirement fund was contributory was held to be a sufficient substantial difference accounting for the differential tax treatment. *Id.* at 935. And on this basis, the court ruled that the evidence "[did] not support a claim that the Commonwealth is taxing Federal retirees in a discriminatory manner." *Id.* at 936. The differences in this matter are even more compelling than those in *Filios*. Furthermore, all persons present before this Court are taxed in the same manner. Therefore, there is no discrimination against the Petitioners.

In 1991, Oregon repealed the tax exemption granted to state retirees in response to *Davis* since no similar tax exemption was granted to federal retirees. *See Ragsdale v. Dept. of Revenue*, 895 P.2d 1348, 1350 (Or. 1995), *cert. denied*, 116 S.Ct. 569, (1995). Subsequently, the

Oregon Legislature increased retirement benefits to some state retirees, but "did not extend any reciprocal benefits to federal retirees taxed under Oregon Law . . . ." *Ragsdale*, 895 P.2d at 1351. Ensuing this legislative modification, a federal retiree brought suit for a refund of state taxes paid and claimed that Oregon impermissibly discriminated against federal retirees since Oregon did not extend similar retirement benefits to retired employees of the federal government. *Id.*

The Oregon Supreme Court noted that there was no *per se* discrimination in the tax code of Oregon and that both the federal and state retirement benefits were taxed similarly. *Id.* at 1352. The court then cited with approval the order entered by the Oregon Tax Court:

> "What the state does with regard to compensation of its employees, current or retired, is simply irrelevant to an inquiry as to the tax treatment of state and federal pensions. In essence, [taxpayer] argues that the state cannot change the compensation of its employees without forfeiting the right to tax federal pension income. This is the very type of interference that the doctrine of intergovernmental tax immunity was intended to prevent. *Davis* did not mandate that state and federal retirees must receive equal pension benefits. Rather, *Davis* requires that both classes must be treated equally by the state's income tax laws."

Id. at 1351-52. Stated another way, "[i]ntergovernmental tax immunity does not require that the state treat state and federal employees the same way, it requires only that the state system of taxation be equal." *Id.* at 1353. In reviewing the U.S. Supreme Court's decision in *Davis*, the Oregon Supreme Court stated that the controlling law says that "a state may not discriminate *in taxation* between state and federal retirees, based on the source of the benefits." *Id.* at 1353, (emphasis in original). The court also stated that nothing within the controlling legislation dictated that states must give consideration to the level of

compensation that they pay to their retirees in comparison to the level of compensation paid by the federal government to its retirees. *Id.* at 1354. The court concluded that "[f]ederal employees lose the right to complain about inequality in the state tax system when the system treats them equally. Oregon does that now." *Id.* at 1357.

In the case before this Court, the Petitioners are seeking an extension of a non-tax benefit simply because Alabama has given a per diem expense allowance to its law enforcement personnel. Alabama's tax law is not discriminatory: that is to say, the Petitioners agree that the State of Alabama taxes per diem subsistence allowances in the exact same manner for both federal and state law enforcement personnel. What the state does with regard to its employees is a question for the legislature as long as the State does not discriminate against federal employees *in taxation*. If one accepts Petitioners' argument, the logical extension is that a state could not change any compensation or expense reimbursement plan designed for its employees without affecting the taxation scheme of federal employees and, conseqeuntly, all employees, both federal and state. The *Davis* holding did not mandate that federal and state employees and/or retirees receive the same benefits or compensation. *Davis* only requires similar classes to be treated equally by the States' income taxation laws. Alabama does that now.

CONCLUSION

The conclusio[illegible]ons reached by the Alabama trial and appellate courts a[illegible]re correct and based soundly upon established law. The[illegible] per diem subsistence expense allowance received by stat[illegible]te law enforcement officers is distinguishable from the r[illegible]egular pay of the Petitioners, and for this reason the state[illegible] tax exemption is not violative of federal or state law. T[illegible]he U.S. Constitution and federal law do not prohibit th[illegible]e practice of Alabama to exempt all per diem allowance[illegible]s just because the federal government has chosen not to r[illegible]match the State's subsistence allowance to its law enforcen[illegible]ment officers. The expense allowance allocated by the Al[illegible]abama Legislature is not discriminatory as it is reasonably[illegible] related to reimbursing law enforcement officers for expe[illegible]nses likely to be incurred during the course of performance of their daily duties.

For these re[illegible]asons, this Court should deny the Petition for Writ of Cert[illegible]iorari.

Respectfully submitted,

MARK D. WILKERSON *
Attorney at Law
405 South Hull Street
Montgomery, AL 36101-0830
(334) 265-1500
Attorney for Respondent
Alabama State Police
Association

E. HAMILTON WILSON, JR.
Attorney at Law
60 Commerce Street, Suite 1100
Montgomery, AL 36102-2148
(334) 834-7680
Attorney for Respondent
Alabama State Troopers
Association

* *Counsel of Record*

December 22, 19[illegible]997

APPENDIX

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Act No. 27 S.J.R. 16—Fine, Goodwin

SENATE JOINT RESOLUTION

TO DECLARE THE INTENT OF THE LEGISLATURE IN REGARD TO ACT NO. 763, H. 286, 1973 REGULAR SESSION (ACTS OF 1973, P. 1145), AS AMENDED, WHICH PROVIDED A SUBSISTENCE ALLOWANCE FOR CERTAIN LAW ENFORCEMENT OFFICERS IN THE STATE OF ALABAMA.

BE IT RESOLVED BY THE LEGISLATURE OF ALABAMA, BOTH HOUSES THEREOF CONCURRING, That it was and is the legislative intent of the Legislature of the Sovereign State of Alabama that the subsistence allowance provided by Act No. 763, H 286, 1973 Regular Session (Act of 1973, p. 1145), as amended, was to be solely a subsistence expense allowance for the purpose of providing meals while said officers are on duty and is not considered as compensation under the laws of this state.

It was and is the legislative intent that this subsistence allowance shall not be subject to any income or other taxes levied by the State of Alabama or the federal government.

Approved June 10, 1977.

Time: 4:30 P.M.